BC SUPREME COURT PROVIDES YET ANOTHER REMINDER TO EMPLOYERS ABOUT THE IMPORTANCE OF DRAFTING RESTRICTIVE COVENANTS WHICH ARE CLEAR AND NOT OVER BROAD

Posted on December 28, 2018

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A recent decision of the British Columbia Supreme Court issued October 10, 2018 has provided employers with yet another very clear reminder that care must be taken to ensure that employee restrictive covenants are clear and not over broad in scope.

In *Telus Communications Inc. v. Golberg* [2018] BCSC 1825 Telus sought an interlocutory injunction to restrain a senior employee from taking up new employment with Rogers Media Inc. following his resignation.

In seeking an interlocutory injunction, Telus relied on a restrictive covenant in the employment agreement with Daniel Golberg. Telus also relied on an alleged breach by Mr. Golberg of his fiduciary duty to Telus.

The reasons of the court establish that after Mr. Golberg decided he would leave Telus if he were able to secure a position with Rogers Media, he continued to participate in high level business strategy meetings, including where initiatives to compete with Rogers Media were discussed. Also, without disclosing that he intended to resign and commence work with Rogers Media, Mr. Golberg endeavoured to negotiate a severance package, giving the explanation to Telus that he wished to focus on family before thinking about the next stage of his career and that he needed "a severance package to tide him over until he found another position".

Restrictive covenant

In part, the Telus restrictive covenant provided that Mr. Golberg would not

> Directly or indirectly either individually or in partnership or jointly or in conjunction with or on behalf of any person or persons, firm, association, syndicate, corporation or other enterprise, as principal, agent, employee, director, officer, shareholder or contractor or in any other manner whatsoever:
>
> 1. Carry on or be engaged in executive, management, supervisory or strategic work or participate in, make decision ins [sic] respect of, direct, assist with, contribute to, advise on, provide consulting or other

> services in respect of any strategic management, supervisory or executive matters for any person or persons, firm, association, syndicate, corporation or other business enterprise engaged in or concerned with or interested in any business which is competitive with the business of Telus within the provinces of British Columbia, Alberta, Ontario and Quebec.

The British Columbia Supreme Court held that the restrictive covenant was unenforceable because it was vague as to its meaning and was over broad in scope.

First, the court held that the interest of Telus that required protection from competition from Mr. Golberg was limited only to its communications business. The court held the restrictive covenant was over broad and thus unenforceable because it included a blanket prohibition which went far beyond what was reasonable to protect the legitimate interests of Telus:

> ... It is the blanket prohibition against taking employment with any competitor of the employer or any of its subsidiaries regardless of whether the new position had any relationship to the duties and knowledge that the employee had while employed by the employer that makes the covenant overly broad in my view.

Second, the court held that the inclusion of the words in the restrictive covenant, "in any other manner whatsoever", meant that the specificity of the prohibited types of connection was lost. Accordingly the restrictive covenant provision was too vague to be enforceable.

The court was blunt in its assessment of the restrictive covenant. The court stated that in its view the restrictive covenant "... is the product of overzealous drafting by Telus's solicitors". The court added that the entire focus of the covenant appeared to be "directed to making the covenant as broad as possible without giving adequate consideration to the important interests that Telus seeks to protect in the covenant or the interests of Mr. Golberg as an employee".

Breach of fiduciary duty

The court held that Mr. Golberg breached his fiduciary duty to Telus in actively pursuing a termination package without disclosing that he had decided to leave Telus and take a position with Rogers Media. In addition the court found that Mr. Golberg had also breached his fiduciary duty in continuing to be involved in meetings concerning Telus business initiatives, including initiatives which were competitive with Rogers Media, without having disclosed his employment discussions with Rogers Media.

However, despite the finding of the court that Mr. Golberg had breached his fiduciary duty and that Telus had established that it would suffer irreparable harm if it succeeds at trial and an injunction is not granted, the court nonetheless held that Mr. Golberg's conduct did not disqualify him from being able to pursue his career

in the absence of a binding non-competition agreement. The court referred to the jurisprudence on restrictive covenants, which emphasizes the importance placed by the law on facilitating "the ability of persons to pursue their means of earning a livelihood".

The court concluded that in the absence of a binding non-competition agreement, the balance of convenience favoured Mr. Golberg on the issue of whether he should be enjoined from commencing employment with Rogers Media. The court dismissed the application of Telus to enforce the restrictive covenant because it is "not just and convenient to grant the relief sought".

Summary

This case amply demonstrates to employers as to why care must be taken to ensure that an employee restrictive covenant is clear as to its meaning and not over broad in scope. In using inclusionary words such as "or in any other manner whatsoever" and by casting too wide a net as to the scope of the competition which is prohibited, employers run the risk of achieving no prohibition on competition at all.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.